

BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 246

IN THE MATTER of the Resource Management Act 1991 and of
a Notice of Motion under Section 87G
requesting the granting of resource consents to
WELLINGTON INTERNATIONAL AIRPORT
LIMITED for the WELLINGTON
INTERNATIONAL AIRPORT EXTENSION OF
RUNWAY: CONSTRUCTION, OPERATION
AND MAINTENANCE
(ENV-2016-WLG-000058)

Court: Environment Judge B P Dwyer
Environment Commissioner I M Buchanan
Environment Commissioner D J Bunting

Hearing: at Wellington on 12 December 2018

Appearances: I M Gordon and A Dewar for Wellington International Airport Ltd
M W Wikaira for Air New Zealand Ltd and Board of Airline
Representatives New Zealand Inc
J D K Gardner-Hopkins for Guardians of the Bays Inc and Hue
te Taka Inc
N J Kile for Jumpjet Holdings Ltd/ Jumpjet Airlines Ltd

Date of Decision: 20 December 2018
Date of Issue: 20 December 2018

PROCEDURAL DECISIONS OF THE ENVIRONMENT COURT

- A: Application to remain on hold until 31 May 2019
B: Strike out application declined
C: Costs reserved

REASONS



Introduction

[1] This procedural decision addresses two matters arising out of the application by Wellington International Airport Limited (WIAL) to extend the runway at Wellington Airport (the Airport) directly referred to the Court pursuant to s 87G Resource Management Act 1991 (RMA).

[2] There are two procedural issues before the Court for determination:

- Firstly, a request by WIAL that its application continues in its current status of “on hold” until 31 May 2019;
- Secondly, an application by Guardians of the Bays Incorporated Society and Hue te Taka Incorporated (jointly - the First Applicants) and Jumpjet Airlines limited and Jumpjet Holdings Limited (Jumpjet) to strike out the application.

Background

[3] WIAL is the owner of the Airport. It wishes to extend the Airport’s runway to enable it to accommodate larger commercial aircraft on long-haul flights. On 28 April 2016, it lodged resource consent applications with Wellington City Council and Wellington Regional Council (jointly - the Councils) to enable the extension to occur. In addition to the applications for resource consents WIAL made a request pursuant to the *Streamlining* sections of RMA (ss 87C-87I) that its application be determined by the Environment Court instead of by the Councils. On 22 July 2016 the Councils determined to approve the request for direct referral to the Court.

[4] The proceedings were filed in the Court on 31 October 2016 after completion of the Councils’ public notification processes. 776 submissions on the application had been received by the Councils.

[5] On 2 November 2016 the Court gave notice to persons who had filed submissions that if they wished to participate in the proceedings before the Court it was necessary for them to file notices pursuant to s 274 RMA recording their interest. The notice period closed on 21 November 2016. One hundred and fifty nine s274 notices were received. The First Applicants and Jumpjet are s 274 parties.



The operation of airports in New Zealand and overseas is subject to various

local and international controls. One of those controls is a requirement contained in the Convention on International Civil Aviation (made in Chicago in December 1944 - the Chicago Convention) which requires airports servicing particular categories of aircraft to have Runway End Safety Areas (RESAs) at each end of their runways.

[7] It is our understanding that New Zealand's regulatory provisions and the Chicago Convention require that for operations of the sort contemplated at the Airport, there must be a RESA of at least 90 m at each end of the runway strip and if practicable at least 240 m or the greatest practicable distance between 90 and 240 m. Determination as to which of these RESA distances is to apply is to be made by the Director General of Civil Aviation (the Director).

[8] WIAL was, of course, aware of these requirements. It considered that 90 m at each end was the appropriate RESA length for the Airport and in 2013 it commenced processes to have the Director confirm that RESAs of 90 m would be acceptable. On 20 March 2015 the Director issued advice to that effect.

[9] The proposal currently before the Court is to extend the Airport runway by 355 m to the south and has been formulated on the basis that when the extended runway becomes operational it will have RESAs at each end of 90 m. The Director's approval as to the length of the RESAs is fundamental to the resource consent application made by WIAL and has framed the extent of the application before the Court.

[10] As is apparent from the reference to "streamlining" in Part 6 RMA, the purpose of the direct referral process (at least in part) is to speed up normal resource consent application processing. Direct referral avoids the usual two-step process whereby resource consent applications are initially heard and determined by local authorities and then appealed to the Environment Court by persons who might be dissatisfied with the outcome of the initial hearing. Large scale projects and/or those attracting very high public interest where there is a high degree of likelihood of appeals can be substantially speeded up by avoiding the first step hearing before a local authority.

[11] In the normal course of events an application filed with a local authority in April 2016 and referred to the Court in October of that year would have been heard and disposed of under the streamlining process some considerable time ago. That



has not happened in this instance. The reason for that is that the Director's approval of 90 m RESAs has been subject to legal challenge by the New Zealand Airline Pilots Association which contends that the appropriate RESA length at each end of the Airport runway should be 240 m and that the Director's decision to approve 90 m was wrongly made as a matter of law.

[12] The futility of the resource consent applications proceeding to hearing in the Court when the Director's underpinning assessment as to the appropriate RESA length was subject to challenge in another jurisdiction, was apparent to anyone interested in the application. If the Director's assessment that a 90 m RESA was adequate should be overturned and a longer runway required, then the resource consent applications in their present form cannot stand. Proceedings in this Court were accordingly put on hold to enable resolution of the challenge to the Director's decision. That challenge went all the way through the New Zealand Court system.

[13] On 21 December 2017 the Supreme Court issued its decision¹ determining that the Director had erred in law in approving the 90 m RESA. On the face of it that should have been the end of these proceedings as well. However, at a judicial conference on 18 April 2018, WIAL advised the Court and other parties that it intended to resubmit an application to the Director for approval of a 90 m RESA. It is WIAL's view that such an approval might still be obtained even having regard to the appropriate matters for consideration by the Director identified in the Supreme Court decision.

[14] WIAL advised that it would make and pursue its resubmitted application with all proper haste and diligence. It anticipated that a decision on the new request to the Director might be made by 31 October 2018. The Court determined to keep the application on hold, with various reporting requirements, until 31 October 2018. No approval was obtained by that date and it is now understood that a possible date for the Director to make a decision could be as late as 31 May 2019. WIAL seeks that the proceedings remain on hold until then. The First Applicants and Jumpjet seek to have the applications before the Court struck out on the basis that it would be an abuse of the Court's process to keep them alive until May 2019.



Wellington International Airport Ltd v New Zealand Air Line Pilots' Association Industrial Union of Workers Inc [2017] NZSC 199, [2018] 1 NZLR 780.

[15] We consider these issues in the context of the strike out application. Obviously, if we agree to strike out that is the end of the current proceedings. If the strike out is declined then inevitably we should grant the extension of time requested by WIAL.

General Legal Issues

[16] The Court's power to strike out proceedings is found in s 279(4) RMA which relevantly provides:

- (4) An Environment Judge sitting alone may, at any stage of the proceedings and on such terms as the Judge thinks fit, order that the whole or any part of that person's case be struck out if the Judge considers—
 - (a) That it is frivolous or vexatious; or
 - (b) That it discloses no reasonable or relevant case in respect of the proceedings; or
 - (c) That it would otherwise be an abuse of the process of the Environment Court to allow the case to be taken further.

In this case, the First Applicants for strike out rely on the abuse of process provision of s 279(4)(c).

[17] At first glance the term abuse of process suggests that those subject to strike out proceedings must have abused or misused Court processes in some way. In our experience that is commonly the basis on which strike out orders are made by the Court. Many of the authorities referred to by counsel in these proceedings, and the instances identified in them as constituting abuse of process, address situations where parties have acted for an ulterior purpose, failed to comply with directions, sought to bring about inordinate or inexcusable delay, or the like. Those are obviously situations where the Court may find there has been an abuse of process.

[18] In his submissions on behalf of the First Applicants, Mr Gardner-Hopkins made some criticism at the speed with which WIAL had advanced its fresh application to the Director but we do not see any merit to his comments in that regard. The subject matter of the application to the Director is one of the utmost gravity which potentially has life or death consequences. WIAL as applicant for approval of a 90 m RESA must be obliged to provide detailed and accurate technical information in support of that request. It is almost inevitable that there will be further inquiry and requests for further information from the Director in undertaking his or



her duties. Nothing we saw indicated that there was any unreasonable or inordinate delay on the part of WIAL in advancing its fresh application and responding to queries from the Director. We do not see anything in the conduct of WIAL in either these proceedings or those before the Director which can be categorized as misconduct of the sort which normally constitutes an abuse of process.

[19] However we do not think that abuse of process is limited to situations of misconduct or the like. As McGechan J observed in *Te Rūnanga o Ngāi Tahu Ltd v Durie*² the term *abuse* is a technical one and does not necessarily have pejorative connotations. Nor is the term defined or limited in the RMA. We respectfully concur with the observation of Randerson J in *Waitakere City Council v Kitewaho Bush Reserve Co Ltd*³ that:

What constitutes an abuse of process for the purpose of the relevant rules in the general Courts or s 279(4) of the RMA is not capable of ready definition, but it is designed to be a flexible remedy which may be applied to a wide variety of circumstances.⁴

[20] We consider that the key issue before us is determining whether or not it is an abuse of process to allow proceedings to remain alive two and a half years after they were originally filed and (assuming WIAL gets a 90 m RESA approval from the Director by 31 May 2019) are unlikely to be ready for hearing until early 2020. In considering that question we ask ourselves whether or not there is any substantial unfairness or prejudice to any existing party to the proceedings or to any other person or body which may be affected in some way by the outcome of the proceedings in allowing the proceedings to remain alive.

[21] We consider that if such unfairness or prejudice is established by the information before the Court and cannot otherwise be remedied or addressed, it is open to us to strike out the WIAL application as an abuse of process, even in the absence of any "misconduct" on the part of WIAL.



²

Te Rūnanga o Ngāi Tahu Ltd v Durie [1998] 2 NZLR 103 (HC) at 107.

Waitakere City Council v Kitewaho Bush Reserve Co Ltd [2005] 1 NZLR 208 (HC).

Waitakere City Council v Kitewaho Bush Reserve Co Ltd [2005] 1 NZLR 208 (HC) at [66].

The First Applicants' case

[22] Mr Gardner-Hopkins filed comprehensive written submissions on behalf of his clients' strike out application. In his oral presentation, he identified what he saw as being four key reasons for the strike out application arising out of those submissions. We summarise them here.

[23] Firstly, Mr Gardner-Hopkins pointed to the significant additional time which had passed since the April 2018 hearing where the Court put the applications on hold until 31 October 2018. He contended that if WIAL had requested a 14-month adjournment (until May next year) at that time it probably would not have been granted. He submitted that this is a direct referral and that it is not a right but a privilege for an applicant to be granted such a referral. He submitted that part of the policy rationale for direct referrals is quick decision making and a reduction of timeframe for process. He contended that the delay in this case was substantial and inordinate.

[24] A matter on which Mr Gardner-Hopkins laid some emphasis was the contention that by striking out the application now there was a real possibility that if WIAL reapplied for consents (as it stated it would do) there was an opportunity for a hearing at Council level. Mr Gardner-Hopkins contended that this might enable a better and more participatory process than a first instance hearing before the Court under the direct referral process.

[25] We concur with Mr Gardner-Hopkins' submissions as to the purpose of the direct referral process, although we do not see the availability of that process is a privilege. It is simply a process which the RMA has made available with a view to more speedily resolving potentially controversial applications for major projects by avoiding a first stage local authority hearing.

[26] We agree that the delay is substantial but we consider that it is understandable. It has been brought about by proceedings in a different jurisdiction which had a material impact on the ability to advance these applications.

[27] We give no weight to Mr Gardner-Hopkins' contention that requiring a new application might lead to the matter being heard by the Councils in the first instance rather than a direct referral. He suggested that recommencing the process by a



fresh application might lead to a rejuvenated process where there would be a greater opportunity for public participation. Such contentions were entirely speculative. It is equally open to speculate that the reasons which led to the Councils determining to make a direct referral remain valid, indeed considerably more so than was previously the case in light of the delay up until now. Ultimately the process to be adopted on any new application which WIAL might make following determination of the RESA length if these proceedings are struck out is one to be made by the Councils in light of the information before them at that time.

[28] The second matter advanced by Mr Gardner-Hopkins was the contention that circumstances have changed since the application was initially filed. The application was supported by 27 technical reports and work done in respect of those reports pre-dated them by some time. Much of the information contained in the reports would now be three or four years old. For example, affidavit evidence provided to the Court by the First Applicants has identified changes in the character of Lyall Bay which they say need to be taken into account.

[29] While we accept that when there has been a delay of the length which has occurred in this case, there will inevitably have been changes to the environment which might impact in some way or other on the application, we do not consider that the changes identified by the First Applicants are necessarily of such moment as to require that the application be struck out.

[30] We agree with Mr Gardner-Hopkins' submission regarding the ages of the technical reports. That is a matter of significant concern to us. WIAL provided an affidavit from Mr J Kyle (a planner involved in the WIAL application) addressing the current status of the technical reports and identifying which of them would, in his view, require updating before the application could proceed to hearing. He considered that three reports fell into that category. Mr Kyle's initial report on the technical reports was undertaken in April 2018, so even more time has elapsed.

[31] We consider that whether or not the reports need updating is a matter which the authors of those reports must consider in due course, but clearly there is a real issue as to the current adequacy/accuracy of the reports which were provided in support of the application when it was filed in April 2016. That is even more the case when it is appreciated that (assuming that a RESA approval is obtained by May 2019) hearing of these proceedings will almost certainly not take place until



early/mid 2020 when the reports will be even more dated. The issue for the Court however is not so much the age of the reports themselves, but how they can be properly updated so that current information is provided to the Court and other parties in a manner which does not prejudice those other parties, nor take the proposal outside the ambit of the application at the time it was made.

[32] We are not convinced that strike out is the only way in which changes to the environment or the updating of technical reports can be dealt with. We will return to that issue in due course.

[33] The third point made by Mr Gardner-Hopkins was that the burden was on WIAL to convince the Court that further adjournment was warranted. He contended that WIAL had not discharged that burden. It seemed to us that the converse of that proposition is also the case, namely that the burden is on the First Applicants and Jumpjet to establish that strike out is warranted. Arguments can be made out either way. The Court must exercise a finely balanced discretion.

[34] As we observed earlier, if strike out is granted, that will be the end of these current proceedings (although not necessarily the extension proposal). If strike out is declined then the extension requested by WIAL appears to be the only viable option. It is the merits of the strike out application which are determinative in this matter.

[35] The final point emphasized by Mr Gardner-Hopkins was the question of prejudice. We think that the heart of his case in that regard was the evidence (which we accept) as to the stress and concern to which the people and communities involved in and potentially affected by the WIAL application are subject. We consider that there are two aspects to that.

[36] The first is the stress of being involved in complicated, prolonged and costly legal proceedings. Litigation stress is a reality which is well recognised. We have no doubt that many of the participants in these proceedings will have "had enough". It reflects badly on the administration of justice when proceedings become as prolonged as these have and we accept that there is a consequential adverse and real effect on the community which arises as a result of the delay which is experienced in this case.



[37] The second adverse effect arises because persons have to live in a situation where they do not know whether or not what they consider to be a highly undesirable situation with adverse effect on them will come about. The uncertainty hangs over them like the Sword of Damocles. Again, we accept that is a real effect and one which is highly undesirable.

[38] Regrettably, striking out the application at this time does not resolve these issues for the First Applicants or other persons who may feel similarly. As we have noted previously, WIAL has signaled quite unequivocally that in the event that the current proceedings are struck out, it will file fresh applications for resource consents on a similar basis if its 90 m RESA proposal subsequently receives the Director's approval.

[39] Even if we strike the proceedings out now, that will be in a context where WIAL's application to the Director for a 90 m RESA remains alive and actively pursued. If that application is successful it will provide the basis for either the continuation of these proceedings or the filing of new proceedings. It appears to us that the level of anxiety must remain until the outcome of the application to the Director is known, even if the current application is struck out.

[40] When the Court granted the extension of time to WIAL on 20 April 2018 to enable it to pursue its application to the Director, it did so on the basis that monthly reports were to be filed with the Court and made available to all parties to these proceedings, keeping them informed as to progress with that application. If these proceedings are struck out, the parties will lose such advantage as there might be of at least being "kept in the loop" on the parallel application.

[41] It appears to us that similar comments might be made regarding the Sword of Damocles proposition. That situation must persist until it is finally known whether or not WIAL will actually proceed to construct the extension, assuming that it obtains its resource consent and RESA approvals. It has sought a lapse period of up to 15 years to give effect to any resource consent, so that, if the lapse period was approved, uncertainties for the community may potentially remain until the day construction starts within that period.



[42] Regrettably, we consider that there is probably little we can do to assuage parties' concerns in that regard. The Sword of Damocles will continue to hover over

the community as long as WIAL retains the intention to advance its extension project and ultimately commences work to do so. We do not consider that situation is made either better or worse by a determination to strike out the current application.

Jumpjet's case

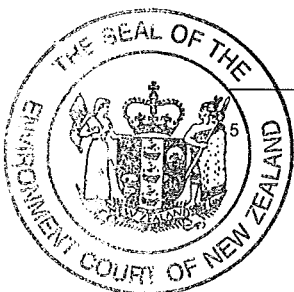
[43] Jumpjet is a company which wishes to establish an airline business serving the Tasman and New Zealand routes. It contends that it has had to "set aside key elements of Company development for 2.5 years, on advice from Consultants, to enable case conclusions to prevail. The Company will resume advancement in due course following the closing of the case before the Court as finalisation will provide more industry certainty"⁵ Even after questioning Mr N J Kile (Jumpjet's director), we remained uncertain as to precisely how keeping these proceedings alive had an actual adverse impact on Jumpjet's intentions. We accept that the uncertainties which currently exist are unsatisfactory from Jumpjet's point of view, as they are for every other participant in these proceedings.

[44] We do not think it is unfair to Jumpjet to observe that the bulk of its submission addressed technical matters which might well be relevant to the Director's considerations but are less relevant for us in determining whether or not to strike out this application.

Discussion

[45] The Court is faced with the alternatives of:

- Striking out the current proceedings so that the time, costs and effort already expended by all parties (including WIAL, Councils and submitters) are effectively wasted. This in a context where WIAL has formally advised the Court and other parties that if the strike out application succeeds it intends to make a further application for resource consent, should the Director approve the 90 m RESA proposal; or
- Putting the proceedings on hold until 31 May 2019, nearly six months away. Not only must there be a high degree of uncertainty as to the outcome of WIAL's application to the Director, there can be no guarantee that an answer will be received from the Director by that date. We appreciate that the Director will take such time as is necessary to



Jumpjet submission.

make such an important decision and it is entirely possible that WIAL may be back before the Court seeking more time in May 2019.

Both alternatives are unsatisfactory.

[46] In the normal course of events a delay of the duration experienced in this case would work strongly in favour of the strike out alternative. We understand the reasons why the First Applicants seek to bring these proceedings to an end and we sympathise with them. However, a significant factor in our considerations was advice from WIAL that strike out now would simply lead to it making a fresh application should the Director subsequently approve the 90m RESA. Accordingly, the Airport extension proposal is not going to go away should we strike out this current application.

[47] The “crunch issue” in our view in determining which option to adopt was whether or not substantive prejudice might arise to other parties or potential parties should we grant the extension to 31 May 2019 and the 90 m RESA is approved by that date so that the application proceeds in its current form. There seem to be two issues of potential prejudice in that regard.

[48] The first is that there is potential for there to be changes to the information contained in the 27 background reports forming part of the application. That could happen due to new information becoming available from ongoing investigation, passage of time, changes in circumstances or any number of other reasons.

[49] We can indicate that should we grant the extension and WIAL obtain the Director’s RESA approval and pursue this current application, then we would certainly exercise the powers contained in s 92(1) and/or s278(1) RMA to require an update of all of the reports currently forming part of the application. We would require that once such reports had been filed, appropriate public advice would be given so that they could be examined by anyone who might have an interest in them.

[50] We consider that requiring all the technical reports to be updated largely addresses any potential prejudice which might arise from any inaccuracies in the evidence due to change of circumstances, delay or the like. WIAL has suggested that any updated information could be disclosed during the evidence



exchange process. However, we did not regard that proposal as satisfactory as evidence exchange is confined to those persons who are currently parties before the Court and it seemed to us that other persons who are not currently involved in these proceedings may potentially have an interest in or be affected by any new information.

[51] The second potential prejudice we see largely arises out of the first and applies to persons who might previously have considered the application and not submitted on it or alternatively having filed a submission did not take the next step of filing a s 274 notice in these proceedings so are not parties in the Environment Court. There is potential for those parties to seek to review or change their position in light of information which might come to hand in the updated reports. Further to that, there may have been parties who chose not to submit or participate at all because their concerns may have been addressed by the information contained in the initial reports. Again, the information contained in the new reports may lead those parties to wish to revisit their position.

[52] A further group potentially affected by the delay in process are persons who may have moved into the vicinity of the Airport in the period between completion of public notification and hearing of the application. The information provided by the First Applicants established that there are a number of such people in one specified area. We think it is almost inevitable that there will be other newcomers potentially affected by the application since its original notification. Unless those persons are successors to s 274 parties, they have no standing in these proceedings even though they may be directly affected by their outcome. That can always be the case when new people move into an area where there is a live resource consent application but the situation where there will be a delay of up to four years or so between filing and hearing the application adds a unique element in this case.

[53] As we indicated at the hearing of these proceedings, if the extension is approved and the Director's approval is granted, we propose to address the concerns set out above by establishing a process whereby:

- WIAL would be directed to obtain updated reports on all existing technical reports pursuant to either ss 92(1) or 278(1) RMA;
- The Court may seek to commission update of any Council reports;
- Once all updated reports were received, public advice would be given as to their availability for inspection by any persons interested in them.



This advice would be given in at least the following ways:

- on the Court's website;
- by written notification by the consent authorities to all persons who filed submissions;
- by written notice by the consent authorities to all persons or owners of properties who were given notice by the Council when the applications were first notified;
- by appropriate public notice in a newspaper;

Such public notice would contain advice to recipients that if they wish to participate in these proceedings it would be necessary for them to give notice pursuant to s 274 RMA and to seek a waiver from time limits which were otherwise applicable. (Waivers would need to be determined on a case by case basis).

[54] The precise form and process to be followed as suggested above would be resolved at a judicial conference involving those current parties who wish to be heard on the subject. Such a conference would be set down as soon as practicable after 31 May 2019.

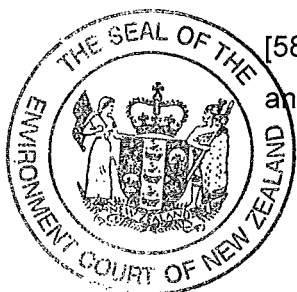
[55] We consider that the provisions of ss 269, 278(1), 279(1)(a) and 281(1)(a)(i) and (ia) allow us to make directions to that effect. Our ability to proceed on this basis is fundamental to the determination which we are about to make. None of the parties at our hearing suggested such a procedure (or something similar to it) was not available to us.

[56] Ultimately, having regard to all of the above considerations, we determine that allowing the WIAL application to remain on hold until 31 May 2019 is the less unsatisfactory of the two unsatisfactory options before us.

Outcome

[57] The applications to strike out by the First Applicants and Jumpjet are declined. WIAL's request that its application be put on hold until 31 May 2019 is approved.

[58] Costs on these proceedings are reserved in favour of the First Applicants and Jumpjet against WIAL notwithstanding that the strike out applications were



declined. We appreciate that it is unusual to reserve costs in favour of unsuccessful parties, however their applications were made for understandable reasons and cogently advanced. They should not have to carry any cost in this situation. We assume that Jumpjet's costs will be confined to any out of pocket expenses as it was not represented by counsel, but rather by its Director. Costs applications are to be filed and responded to in accordance with para 6.6(f) of the Environment Court Practice Note 2014. We hope that costs might be resolved by discussion between the parties.

[59] In the event that the Director's approval is received by 31 May 2019 the Court will hold a further judicial conference on these proceedings as soon as can be practically arranged thereafter to make further directions addressing the matters set out in paras [53] – [54] (above).

For the Court:


BP Dwyer
Environment Judge

